Supreme Court, U.S.
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No. 05-1439

In The Supreme Court of the United States

MARY DEROCHE and ERIC DEROCHE,

Petitioners,

v.

ARIZONA INDUSTRIAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

The Court of Appeals determined that Petitioners were not entitled to an award of attorney's fees under an Arizona statute that awards attorney's fees to parties who prevail in civil litigation that the State brought against them because federal law does not allow fees for litigation of the substantive federal bankruptcy issues that were litigated here. Are Petitioners entitled to an award of attorney's fees for prevailing against the Arizona Industrial Commission on the issue of dischargeability when the attorney's fees are not provided by the Bankruptcy Code or a contractual provision between the parties?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, Arizona Industrial Commission (the "Commission"), respectfully requests this Court to deny Mary and Eric DeRoche's Petition for Certiorari seeking review of the opinion of the Ninth Circuit Court of Appeals.

STATEMENT OF THE CASE

This case concerns whether a litigant in federal bankruptcy court is entitled to an award of attorney's fees for litigating federal issues in bankruptcy court when the fees are not authorized by federal law or contract. No federal court has held that a debtor is entitled to an award of attorney's fees for prevailing on a federal bankruptcy issue even though the Bankruptcy Code does not allow fees and there is no contractual relationship between the creditor and debtor. Therefore, this decision does not conflict with the decisions of other circuit courts. Because the Court of Appeals decision is consistent with this Court's precedent and the purposes of the Bankruptcy Code, the Court should deny certiorari.

A. Statement of Facts.

Petitioners filed a joint Chapter 7 bankruptcy petition on November 28, 1994, in the District of Arizona. On December 30, 1994, the Commission filed a priority proof of claim ("Claim") for continuing payments to Petitioners' former employee, who was injured while Petitioners failed to have workers' compensation insurance as required by state law. Petitioners objected to the Claim.

First, the parties litigated whether the Claim was an excise tax entitled to priority under 11 U.S.C. § 507(a)(8)(E). While the parties were litigating the issue, the Ninth Circuit decided *Indus. Comm'n of Arizona v. Camilli (In re Camilli)*, 94 F.3d 1330 (9th Cir. 1996), which established that reimbursement claims for workers' compensation benefits are excise taxes. The bankruptcy court held that the Commission's Claim constituted an excise tax. Pet. App. at 2a-3a.

Next, the parties litigated the transaction date for the excise tax. Excise taxes for transactions occurring within three years preceding the bankruptcy filing are priority claims. 11 U.S.C. § 507(a)(8)(E)(ii). The Commission interpreted "transaction" in accordance with *In re Waldo*, 186 B.R. 118 (Bankr. D. Mont. 1995), *aff'd*, 108 F.3d 340 (9th Cir. 1997), as a priority claim that was nondischargeable pursuant to 11 U.S.C. § 523(a)(1). The bankruptcy court agreed with the Commission and ruled in its favor. *DeRoche v. Ariz. Indus. Comm'n (In re DeRoche)*, 287 F.3d 751, 755 (9th Cir. 2002). Petitioners appealed, and the district court upheld the bankruptcy court's decision. *Id.*

Petitioners again appealed and finally obtained a favorable ruling. *Id.* at 757. The Ninth Circuit held that the transaction date for the excise tax was the injury date, which was more than three years before the bankruptcy was filed. *Id.* Accordingly, the Claim was not a priority claim and was dischargeable. At each level, the federal courts decided only the federal law issues of priority and dischargeability and did not decide any state law issues. On remand, the bankruptcy court sustained the Petitioners' objection to the Claim and found that the Claim was included in the discharge order entered seven years before. Pet. App. at 3a.

B. Proceedings Below.

On August 7, 2002, Petitioners filed an application under Arizona Revised Statute § 12-348 for over $30,000 in attorney's fees incurred in the ultimately successful challenge to the Claim. This Arizona statute permits a court to award attorney's fees against the State if a litigant prevails in an action against it to challenge the assessment or collection of taxes. Petitioners cited no basis in the Bankruptcy Code for the claimed attorney's fees. The bankruptcy court denied the request for attorney's fees. Pet. App. at 18a. The Petitioners appealed. The district court denied the appeal. Pet. App. at 13a. The Petitioners appealed to the Ninth Circuit. After oral argument, the Ninth Circuit denied the appeal, because the Petitioners had not demonstrated any federal right to attorney's fees for litigating purely federal issues in federal bankruptcy court. Pet. App. at 9a.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit's Decision Is Consistent with This Court's Prior Decisions, the Bankruptcy Code, and Congressional Intent.

"It is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415 (1978) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)). "Congress has provided only limited exceptions to this rule 'under selected statutes granting or protecting *various federal rights*.'" *Id.* (quoting *Alyeska Pipeline*, 421 U.S. at 260 (emphasis added)).

In *F.D. Rich Co., Inc. v. United States, Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974), this Court established that a litigant in federal court is not entitled to an award of attorney's fees for litigating federal rights unless a federal statute authorizes the fees. In that case, this Court explained:

> The Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law. Neither respondent nor the court below offers any evidence of congressional intent to incorporate state law to govern *such an important element* of Miller Act litigation *as liability for attorneys' fees*. Many federal contracts involve construction in more than one State, and often, as here, the parties to Miller Act litigation have little or no contact, other than the contract itself, with the State in which the federal project is located. The reasonable expectations of such potential litigants are better served by a rule of uniform national application.

Id. at 127 (emphasis added).

This Court could as easily have been writing about the Bankruptcy Code. Like the Miller Act, the Bankruptcy Code provides a federal cause of action. The Bankruptcy Code, not state law, determines the scope of the remedy (discharge) and the substance of the rights created thereby (discharge injunction). The Petitioners have offered no evidence of congressional intent to incorporate state law regarding attorney's fees into bankruptcy court litigation. In fact, the Bankruptcy Code itself contains provisions regarding attorney's fees, establishing the federal right to attorney's fees in federal bankruptcy litigation in the circumstances when Congress has deemed such fees

appropriate. *See* 11 U.S.C. §§ 110(i)(1), 110(i)(2), 111(g)(2)(B), 303(i)(1)(B), 362(k), 506(b), 523(d), 526(c)(2), 526(c)(3)(C), 707(b)(4)(A), and 707(b)(5)(A). Finally, the need for uniformity under the Bankruptcy Code is even stronger than under the Miller Act, since the Constitution requires uniformity for bankruptcy laws. The Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4.

Moreover, this rule is intrinsically sound: Congress decides whether attorney's fees are allowed when litigating federal rights that Congress has established in the first instance. It is appropriate that state law, including state contract law, govern whether litigants are entitled to attorney's fees for litigating state law rights. To the extent that Petitioners argue that state law should govern whether parties are entitled to attorney's fees incurred litigating federal rights, they are simply mistaken: States lack authority to direct that federal courts award attorney's fees to a party who prevails on an issue of federal law. *F.D. Rich,* 417 U.S. at 127.

The Bankruptcy Code, like the Miller Act, is a complex system. As the Ninth Circuit correctly noted, "[t]here is no general right to recover attorney's fees under the Bankruptcy Code." *Renfrow v. Draper,* 232 F.3d 688, 693 (9th Cir. 2000). Congress has permitted attorney's fees in bankruptcy cases only when it has deemed them necessary to further a congressional purpose. As part of its statutory scheme, Congress has historically permitted attorney's fees to oversecured creditors under 11 U.S.C. § 506(b), to a prevailing debtor when an involuntary petition is filed under 11 U.S.C. § 303(i)(1)(B), to individuals injured by willful violations of the automatic stay under 11 U.S.C. § 362(k), and to a debtor for successfully defending against the nondischargeability of a consumer debt if the creditor's

position was not substantially justified under 11 U.S.C. § 523(d).

Significantly, Congress recently made sweeping changes to the Bankruptcy Code, including adding several attorney's fee provisions. Under the Bankruptcy Abuse Prevention and Consumer Protection Act, Congress added the following provisions allowing attorney's fee awards: debtors may obtain attorney's fee awards against petition preparers under 11 U.S.C. § 110(i)(1); trustees and creditors may obtain attorney's fee awards against petition preparers under 11 U.S.C. § 110(i)(2); debtors may obtain attorney's fee awards against nonprofit budget and credit counseling agencies that willfully or negligently fail to comply with the Bankruptcy Code under 11 U.S.C. § 111(g)(2)(B); assisted persons may obtain attorney's fee awards against debt relief agencies for intentionally or negligently failing to comply with certain sections of the Bankruptcy Code under 11 U.S.C. § 526(c)(2); the States may obtain attorney's fee awards against debt relief agencies under 11 U.S.C. § 526(c)(3)(C); the trustee may obtain attorney's fee awards against the debtor's attorney under 11 U.S.C. § 707(b)(4)(A); and the debtor may obtain attorney's fee awards against a party in interest under 11 U.S.C. § 707(b)(5)(A). Despite these far-reaching changes to the Bankruptcy Code, Congress has not included a provision that allows an award of attorney's fees to a debtor for litigating priority and dischargeability or a provision allowing a debtor to obtain an award of attorney's fees under a state statute. Congress permits attorney's fee awards in bankruptcy only when it has determined that such awards serve a congressional purpose.

Petitioners misunderstand *Security Mortgage Co. v. Powers (In re Florida Furniture Co.)*, 278 U.S. 149 (1928). They assert that in that case this Court held that the determination of a claim for attorney's fees is a question of local law. *See* Pet. at 3. This Court actually held:

> The validity of the lien claimed by the mortgage company for attorney's fees must be determinated by the law of Georgia; for the contract was there made and was secured by real estate there situate. . . . The construction of the contract for attorney's fees presents, likewise, a question of local law.

Florida Furniture, 278 U.S. at 153-54 (citations omitted). Thus, the amount of the *lien*, including whether the lien includes attorney's fees, is determined by local law. Notably, in 11 U.S.C. § 506(b), Congress specifically included fees as charges that can be included in a claim secured by a lien if the property exceeds the base value of the debt. *Florida Furniture* does not hold, however, that the federal court must apply state law to determine if attorney's fees are available to a party who prevails on a federal issue.

Petitioners also misunderstand the import of *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2003). In that case, this Court noted that the Bankruptcy Code provides that all debts are discharged unless a specific provision excepts the debt from discharge. *Id.* at 302-03. Because the Bankruptcy Code provides for attorney's fees in several discrete circumstances, it does not need an additional section disallowing the fees. Under the principle *expressio unius est exclusio alterius*, the inclusion of the fees in the enumerated circumstances indicates that Congress intended that all parties bear their own fees in all other circumstances. *See Colbert v. Colbert (In re*

Colbert), 185 B.R. 247, 248 (Bankr. M.D. Tenn. 1995) (mem.); *Pride Cos., L.P. v. Johnson (In re Pride Cos., L.P.)*, 285 B.R. 366, 372 (Bankr. N.D. Tex. 2002) (mem.); *cf. TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent.") (internal quotations and citation omitted).

Attorney's fees are permitted under the Bankruptcy Code against a creditor for unsuccessfully pursuing non-dischargeability of a consumer debt if the creditor's position was not substantially justified. 11 U.S.C. § 523(d). No corresponding provision allows attorney's fees to the creditor for successfully prosecuting a non-dischargeability action. The absence of such a corollary position is not an oversight:

> H.R. 8200 adopts a compromise. The false financial statement exception [to discharge of consumer debts] is retained, and the creditor, as under current law, is required to initiate the proceedings to determine if the debt is nondischargeable. If the debtor prevails, however, the creditor is taxed costs and attorney's fees, and may be taxed any actual pecuniary damages, such as loss of a day's work, that the debtor might have suffered as a result of the litigation. The present pressure on the honest debtor to settle in order to avoid attorney's fees in litigation over a creditor-induced false statement is eliminated. The creditor is protected from dishonest debtors by the continuance of the exception to discharge.
>
> The bill does not award the creditor attorney's fees if the creditor prevails. Though such a

> balance might seem fair at first blush, such a provision would restore the balance back in favor of the creditor by inducing debtors to settle no matter what the merits of their cases. In addition, the creditor is generally better able to bear the costs of a litigation than a bankrupt debtor, and it is likely that a creditor's attorney's fees would be substantially higher than a debtor's, putting an additional disincentive on the debtor to litigate.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 131, *reprinted in* 1978 U.S.C.C.A.N. 5787, 6092. Even more tellingly, Congress did not include a provision allowing attorney's fees against a creditor for pursuing non-dischargeability of a *non-consumer* debt, which is analogous to the instant case.[1] Congress could not have made it more clear that it was allowing and disallowing attorney's fees when it believes they will further the purposes of the Bankruptcy Code.

This Court held that federal courts may not create exceptions to the American Rule except under congressional guidance:

> In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. We are asked to fashion a far-reaching exception to this 'American Rule'; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative

[1] The litigation in the instant case arose when the Petitioners objected to the Commission's Claim. Alternatively, the Commission could have filed a Complaint to Determine the Claim Non-Dischargeable under 11. U.S.C. § 523.

> guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.

Alyeska Pipeline, 421 U.S. at 247.

Petitioners argue that the Ninth Circuit is creating federal common law. Pet at 13. In *Atherton v. F.D.I.C.*, 519 U.S. 213, 218 (1997), this Court defined federal common law as "a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision." In denying attorney's fees here, the Ninth Circuit did not create federal common law. It merely applied the Bankruptcy Code.

Even if the Ninth Circuit were creating federal common law, it would be appropriate, because bankruptcy is an area of significant federal interest. Congress is constitutionally empowered to create uniform federal laws. The Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4. This Court has sanctioned the creation of federal common law when uniformity was desired. *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). "The controlling legal requirement [is] the existence of a need to create federal common law arising out of a significant conflict or threat to a federal interest." *Atherton,* 519 U.S. at 224. Certainly, interfering with uniformity in bankruptcy constitutes a significant threat to a federal interest.

This Court should deny certiorari because the Ninth Circuit decision to deny fees correctly applies the Bankruptcy Code and is consistent with this Court's precedent.

II. The Ninth Circuit Decision Does Not Conflict with the Decisions of Other Circuits.

There is a split among the circuits regarding whether a contractual claim for attorney's fees that is valid under applicable state law is properly included as part of a secured creditor's claim and recoverable in bankruptcy. *See* 4 *Collier on Bankruptcy,* ¶506.04[3][a] at 506-118 (15th ed. 2006). But the Court cannot resolve the conflict by accepting certiorari here because this case does not involve a creditor's claim for attorney's fees under a contractual provision. This case concerns a claim for attorney's fees under a state statute by debtors who have no contractual relationship with the creditor and who prevailed on the federal issue of dischargeability. Petitioners have cited no cases in which the court has awarded attorney's fees under the circumstances involved here.

The cases that Petitioners rely on to establish an intercircuit conflict involve attorney's fee awards based on contractual provisions that bound the creditor and debtor. *Cadle Co. v. Martinez (In re Martinez),* 416 F.3d 1286, 1290-91 (11th Cir. 2005) (awarding fees to a debtor for successfully defending against a non-dischargeability suit because he had a contractual right to attorney's fees under Florida's reciprocity statute); *Alport v. Ritter (In re Alport),* 144 F.3d 1163, 1168 (8th Cir. 1998) (allowing attorney's fees to a creditor as part of a non-dischargeable debt because attorney's fees provided by contract, like accrued interest, can become part of the debt); *Three Sisters Partners, LLC v. Harden (In re Shangra-La, Inc.),* 167 F.3d 843, 847 (4th Cir. 1999) (awarding attorney's fees to a lessor as pecuniary loss under 11 U.S.C. § 365(b)(1)(B) because the lease provided for attorney's fees in the event of a default and the monies were spent as a result of the

default); *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1168 (6th Cir. 1985) (allowing fees to a prevailing creditor because a contractual right to attorney's fees is part of the debt); *Jordan v. Se. Nat'l Bank (In re Jordan)*, 927 F.2d 221 (5th Cir. 1991), overruled on other grounds by *Coston v. Malvern (In re Coston)*, 991 F.2d 257 (5th Cir. 1993) (following *Martin* to award contractually required attorney's fees to a creditor); *Davidson v. Davidson (In re Davidson)*, 947 F.2d 1294, 1298 (5th Cir. 1991) (following *Jordan* to award contractually required attorney's fees to a creditor); *TranSouth Fin. Corp. v. Johnson*, 931 F.2d 1505, 1509 (11th Cir. 1991) (allowing contractually required attorney's fees to a creditor successful in a dischargeability proceeding); *Worthen Bank & Trust Co. v. Morris (In re Morris)*, 602 F.2d 826, 829 (8th Cir. 1979) (allowing a creditor to recover a contractually required attorney's fee).[2]

The rationale for allowing contractually required fees to be included as part of the debt does not apply here where there is no contractual relationship between the parties. For example, the Sixth Circuit reasoned that allowing prevailing creditors contractually required attorney's fees does not undercut Congress's intention in not allowing creditors to recover attorney's fees, noting: "Prevailing creditors still have no statutory right to attorney's fees, and if they have a contractual right, it must be assumed they gave value for that right at the time credit was advanced."

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[2] Petitioners also cite numerous bankruptcy court decisions to support their argument that the Ninth Circuit decision here conflicts with other decisions. Pet. at 11. These cases also involve the allowance of contractually required attorney's fees and thus do not support their argument.

Martin, 761 F.2d at 1168. Instead of requesting implementation of a bargained for contractual provision, Petitioners requested the lower courts to apply a state statute to award them attorney's fees for prevailing on federal issues. The lower courts correctly denied their request because it is contrary to the provisions of the Bankruptcy Code.

To the extent that other courts have addressed an issue similar to the issue presented here, the courts have denied fees. In *Colbert v. Colbert (In re Colbert)*, 185 B.R. at 249, the Tennessee bankruptcy court recognized that *Martin* was premised on the parties having engaged in bargaining and giving value. Since that did not occur in *Colbert*, the Court did not allow attorney's fees. Similarly, in *V.M. v. S.S. (In re S.S.)*, 271 B.R. 240 (Bankr. D.N.J. 2002), the New Jersey bankruptcy court rejected a claim for attorney's fees for litigating the dischargeability of a judgment overturning a paternity action. The court reasoned:

> The plaintiff's nondischargeability action was not governed by the Parentage Act and did not address the enforcement or vindication of a right generated by the Parentage Act. The issue before the court in the plaintiff's adversary complaint was the nondischargeability of the debtor's debt under 11 U.S.C. § 523. Because the right vindicated in bankruptcy court arose as a federal claim under 11 U.S.C. § 523 and not as a state claim under N.J. Stat Ann. § 9:17-54, the statutory exception to the American Rule does not apply to allow the court to invoke the Parentage Act to award the plaintiff counsel fees for the adversary proceeding.

Id. at 246. And, in *BankBoston, N.A. v. Sokolowski (In re Sokolowski)*, 205 F.3d 532 (2nd Cir. 2000), the Second Circuit refused to allow attorney's fees under a state

statute, because the issue was solely whether a default-upon-filing provision in a contract was enforceable given 11 U.S.C. § 521(2) and the Bankruptcy Code's "fresh start" policy. Since the case "turned solely on issues of federal bankruptcy law," the state statute allowing fees was not implicated. *Id.* at 535.

This Court should deny certiorari because the Ninth Circuit decision does not conflict with the decisions of other circuits.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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